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In The

Supreme Court of the United States

OCTOBER TERM, 1993

PRISCILLA M. GARCIA, MARICELA BUITRAGO, and
Local 115,
United Food And Commercial Workers International Union,
AFL-CIO,
Petitioners,
v.
SPUN STEAK COMPANY, A California Corporation,
Respondent.

On Petition For A Writ of Certiorari to the United States Court of Appeals for the Ninth Circuit

BRIEF OF THE NATIONAL ASIAN PACIFIC AMERICAN LEGAL CONSORTIUM AND THE MEXICAN AMERICAN LEGAL DEFENSE AND EDUCATIONAL FUND, AS *AMICI CURIAE* IN SUPPORT OF THE PETITION FOR A WRIT OF CERTIORARI

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INTEREST OF AMICI CURIAE

Pursuant to Supreme Court Rule 37, the National

Asian Pacific American Legal Consortium, Asian American Legal Defense and Education Fund, Asian Law Caucus, Inc., Asian Pacific American Legal Center of Southern California, and the Mexican American Legal Defense and Educational Fund, submit this brief as *amici curiae* in support of the petition for a writ of certiori. Counsel for both parties have consented to the submission fo this brief, letters of consent have been filed with the Clerk of the Court.

The *amici curiae* are organizations who fight to protect the civil rights for language minority groups in the United States.

The National Asian Pacific American Legal Consortium (NAPALC) is a nonprofit, nonpartisan organization whose mission is to advance the legal and civil rights of Asian Pacific Americans through a national collaborative structure that pursues litigation, advocacy, public education, and public policy development. NAPALC is composed of three organizations based in major urban areas with significant Asian and Pacific Islander population. the Asian American Legal Defense and Education Fund (New York), the Asian Law Caucus, Inc. (San Francisco), and the Asian Pacific American Legal Center of Southern California (Los Angeles).

Founded in 1974, the Asian American Legal Defense and Education Fund is a civil rights organization that addresses critical issues facing Asian Pacific Americans through community education, advocacy, and litigation. Program priorities include the elimination of anti-Asian violence, advancement of immigrant rights, employment and labor rights, and redress for Japanese American World War II internees.

The Asian Law Caucus, Inc. is a nonprofit, public

interest legal organization whose mission is to promote, advance, and represent the civil rights of Asian and Pacific Islander communities. Since 1972, it has provided free and low-cost multilingual legal services, community education, and general advocacy in the areas of immigration, housing, employment and labor, and civil rights.

The Asian Pacific American Legal Center of Southern California is a nonprofit legal organization dedicated to serving the Asian communities through direct services, community education, leadership development, and advocacy. Founded in 1983, it provides multilingual legal and educational services, with programs focusing on immigration, family law, language rights, interethnic relations, dispute resolution, and civil rights advocay.

The Mexican American Legal Defense and Educational Fund is a national civil rights organization established in 1967. Its principle objective is to secure, through litigation and education, the civil rights of Latinos living in the United States. Language discrimination has adversely affected Latinos in a the areas of education, employment, and voting rights, as well as a myriad of other areas. The breadth of this discrimination has substantially impeded, and in some instances precluded, Latinos from the full exercise of constituional and civil rights. This case represents another example of the continued differential treatment of Latinos based upon their linguistic background. For that reason, amicus curiae has a substantial interest in this case.

SUMMARY OF ARGUMENT

The Ninth Circuit's holding in the underlying case is erroneously based on the the assumption that there is no or

little linkage between language and national origin. The panel's findings that a person "chooses" a language when they speak to another person from their home country, that those who speak some English are completely bilingual and that since everyone speaks some English, no one group is harmed are completely contradicted by sociolinguistic literature and the facts of this case.

On the contrary, as will be discussed in the brief, sociolinguistic literature and research show that English-Only rules in the workplace inflict significant harm on national origin minority workers. Furthermore, a review of the origins of social movements to make English this country's official language and to promote English-only rules in the workplace are rooted in the type of discrimination that Title VII was enacted to protect against.

ARGUMENT

I. CONTRARY TO THE NINTH CIRCUIT'S CONCLUSIONS, ENGLISH-ONLY RULES INFLICT REAL INJURY UPON MEMBERS OF NATIONAL ORIGIN MINORITIES

In finding that Spun Steak's English-only policy did not violate Title VII, the Ninth Circuit concluded that: (1) the policy did not constitute national origin discrimination, since "Title VII does not protect the ability of workers to express their cultural heritage at the workplace"; (2) the policy did not impair the ability of bilingual Spanish speakers to communicate, since they "can readily comply with the English-only rule and still enjoy the privilege of speaking on the job," and because the policy therefore "merely inconvenience[d]" those persons; and (3) the policy did not create an atmosphere of inferiority, isolation and intimidation violative of Title VII.

Each of these conclusions is fundamentally mistaken, and flies in the face of abundant psychological and sociological evidence to the contrary. The policy at issue in this case causes clear and tangible harm to all employees who speak languages other than English in that they must suppress a key aspect of their ethnicity, indeed sometimes an entire side of their personality, on the basis of their national origin. Inevitably, this fosters a workplace atmosphere hostile to those of foreign national origin. Moreover, the Ninth Circuit erroneously assumed that the English-only rule imposes no burdens upon bilinguals, irrespective of their actual degree of English proficiency.

A. English-Only Rules Compel National Origin Minority Workers To Suppress An Essential Aspect Of Their Identity.

Unlike those whose only language is English, workers whose mother tongue is another language such as Spanish are uniquely burdened by English-only rules. They are compelled to repress, indeed deny, a central component of their self-identity as a condition of employment. The harshness of this burden -- to which monolingual English employees are not subjected in the workplace -- is recognized in sociological, psychological, and linguistic studies as well as by legal commentators.[1]

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[1] The Ninth Circuit correctly noted that "an individual's primary language can be an important link to his ethnic culture and identity," Garcia v. Spun Steak, 998 F. 2d 1480, 1487 (9th Cir. 1993). However, despite observing that Title VII "is concerned . . . with disparities in the treatment of workers," id., the panel failed to recognize that the burdens of complying with an English-only rule by definition do not fall on monolingual English

It has been established that "for many Americans, speech is an indicator of cultural identity second in importance only to physical appearance. Further, accent, language choice, verbal style, choice of words, phrases and gestures act as a primary vehicle for creative expresion by individuals and groups." Nancy F. Conklin and Margaret A. Lourie, *A Host of Tongues: Language Communities in the United States,* 279 (1983)

The importance of the specific linkage between language and national origin and ethnicity has been elaborated upon:

> By its very nature language is the quintessential symbol, the symbol par excellence. . . . [It] is more likely than most symbols of ethnicity to become the symbol of ethnicity. Language is the recorder of paternity, the express of patrimony and the carrer of phenomenology. Any vehicle carrying such precious freight must come to be viewed as equally precious in and of itself. The link between language and ethnicity is thus one of sanctity-by-association. . . . Anything can become symbolic of ethnicity . . . but since language is the prime symbol system to begin with and since it is commonly relied upon so heavily (even if not exclusively) to enact, celebrate, and 'call forth' all ethnic activity, the likelihood that it will be recognized and singled out as symbolic of ethnicity is great indeed . . . [I]ndeed, it becomes a prime ethnic value in and of itself.

Joshua Fishman, "Language and Ethnicity," in *Language, Ethnicity and Intergroup Relations* 25-26 (Giles, ed., 1977).

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employees.

Another researcher illustrated the centrality of one's ancestral language to identity by reference to an individual's personal testimony on that subject:

> Positive attitudes about one's own language may be felt deeply. A person's sense of identity is usually bound up closely with his mother tongue or first language. A Danish linguist who was fluent in English was asked why he continued to speak Danish, since English is so much more widely used. His initial reaction was to feel almost insulted by the question. But when he was assured that the questioner was sincere, he answered, 'My language is me. Danish is the language through which I learned to know about the world; through which I learned my deepest values at my mother's knee. I will always feel most at home in Danish, react most deeply through Danish, be able to express myself most fluently in Danish.'

Barbara F. Grimes, "Language Attitudes: Identity, Distinctiveness, Survival in the Vaupes," in *Journal of Multilingual and Multicultural Development*, vol. 6, No. 5, 389, 390 (1988).

The language conformity enforced through an English-only policy directly and negatively impacts language minorities. One commentator, noting that "[d]ifferences in dress, language, accent and custom associated with a non-American origin are more likely to elicit prejudicial attitudes than the fact of the origin itself," has observed:

> Even where national origin-linked traits are not immutable, exclusion on that basis is antithetical to

> our notion of equality. Brown's[2] reliance upon the stigmatic harms of legally enforced separation suggests that exclusion on the basis of any national origin-linked characteristic should be impermissible. Forced assimilation, like segregation, may 'generate a feeling of inferiority' that stigmatizes a minority group. To tell the minority group member that he must discard the characteristic manifestations of his national identity in order to have a truly equal and fair opportunity to compete for a job is to tell him that his identity has no place in American society. Indeed, it is to exclude him from that society as long as he retains his ethnic identity. In sum, the reasoning which led the Court to strike down segregation in Brown also suggests the importance of the trait-based approach in protecting cultural identity as an element of equality.

Note, *A Trait-Based Approach to National Origin Claims Under Title VII*, 94 Yale L. J. 1164, 1177-78 (1985) (emphasis in original). *See also* Kenneth L. Karst, *Paths to Belonging: The Constitution and Cultural Identity*, 64 N.C. L. Rev. 303, 325 (1986) ("The pressure to conform carries with it an implication that members of the unorthodox cultural group are inferior. Correspondingly, the subordination of a cultural group . . . undermines confidence in the group's values and perspectives, with the long-term effect of impairing the perceived worth of the group's ethnic identity").

As already noted, these profound effects of enforced English speech obviously fall exclusively upon workers who

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[2] Brown v. Board of Education, 347 U.S. 483 (1954).

speak languages other than English. For those for whom a non-English language is a primary link to their national origin,3 English-only rules differentially operate to disadvantage, indeed stigmatize them in the workplace. Because the same burdens are not imposed on native-born, monolingual English speakers, respondent's English-only policy plainly discriminates on the basis of national origin.

B. English-Only Rules Require National Origin Minority Workers To Suppress Primary Aspects of Their Personality

Paralleling the denigration of ethnic identity caused bilingual employees by English-only rules is the injury resulting from the forced suppression of aspects of one's personality which may only be expressed in a particular language. As Circuit Judge Reinhardt noted in his dissent from the Ninth Circuit's denial of rehearing *en banc*, "English-only rules not only symbolize a rejection of the excluded language and the culture it embodies, but also a denial of that side of an individual's personality." Garcia v. Spun Steak, No. 91-16733, rehearing denied, slip op. 14479, 14484 1993 U.S. App. LEXIS 33530 (9th Cir. 1993).

In addition to being a mode of communication, a language is itself a form of communication, conveying its own characteristic meanings and nuances which add texture to the objective content of the expression:

[L]anguage is not merely a *means* of interpersonal

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[3] Petitioners have cited, and *amici* will not repeat here, the disproportionate effect English-only rules have, in a statistical sense, upon national origin minorities. Petition for Certiorari, pp. 12-13.

> communication and influence. It is not merely a *carrier* of content, whether latent or manifest. Language itself is content, a referent for loyalties and animosities, an indicator of social statuses and personal relationships, a marker of situations and topics as well as of the societal goals and the large-scale value-laden arenas of interaction that typify every speech community.

Fishman, "The Sociology of Language: An Interdisciplinary Social Science Approach to Language in Society," in *Advances in the Sociology of Language*, vol. 1, p. 219 (emphases in original). Indeed, the relationship between language and personality is in some respects reciprocal:

> Most children are introduced into this world and have the world interpreted to them through a single language, their mother tongue. Personality is formed to a considerable extent, if not altogether in all critical respects, under that influence. When acquisition of a second language is socially compelled, as a result of conquest, or economic pressure, . . . new and substantially different ways of viewing and describing the world are introduced.

Accordingly, research indicates that one's personality will in fact vary depending upon the language he or she employs.

> [One researcher] found that as a group, Spanish-English bilinguals revealed notable personality differences depending on the language used. Test results for Chinese-English coordinate bilinguals also indicated personality variations depending on the language used, but these were less evident than for the Spanish-English bilinguals.

"Dr. Jekyll, Señor Hyde," *Psychology Today*, vol. 21, Dec. 1987, p. 16.

Requiring bilingual workers to speak only English in the workplace thus works a harm analogous to that caused to their ethnic identity: they are prohibited from expressing facets of their personality which can only be manifested through a language other than English. Because this burden is not visited upon monolingual English speakers, English-only policies such as that imposed by respondent violate Title VII.

C. The Ninth Circuit Ignored The Workers' Differing Degrees of Bilingualism and English Proficiency

The Ninth Circuit stated that:

> [w]hen the privilege is defined at its narrowest (as merely the ability to speak on the job), *we cannot conclude that those employees fluent in both English and Spanish are adversely impacted by the policy*. Because they are able to speak English, bilingual employees can engage in conversation on the job.

Spun Steak, 998 F.2d at 1487 (emphasis added). The panel's logic is seriously flawed because it mistakenly assumes that Hispanic workers who speak some English are all "fluent in both English and Spanish" no matter what level of English proficiency they have attained. In essence, the Ninth Circuit considered the effect of respondent's policy on just two groups of people: the small group of bilinguals who are fluent in both their primary and secondary language, able to effortlessly move between two languages, and people with absolutely no English language ability. In its analysis,

neither group could be detrimentally affected by an English-only rule. Bilingual employees, who could easily comply with the rule, would not be denied the privilege of speaking, while the non-English speaking employees were exempted from the rule. 998 F.2d at 1488.

By narrowly focusing only on these two groups, however, the Ninth Circuit ignored the large group of bilingual Hispanic workers who have only limited English proficiency and for whom the requirement to solely speak English would adversely affect their ability to communicate and express themselves. The panel made no finding regarding the bilingualism of each of the workers at Spun Steak. It erroneously assumed that those who could speak some English were fully bilingual.

This assumption has no basis in sociolinguistic fact or theory. Most recent immigrants, like the workers at Spun Steak, have varying levels of English speaking ability. In fact, many first-generation immigrants to the United States develop some functional bilingualism, but few become truly fluent bilinguals. Nancy F. Conklin and Margaret A. Lourie, *A Host of Tongues: Language Communities in the United States* 160 (1983). Moreover, almost all adult first-generation Americans will never be fluent in English. Herbert W. Seliger, "Implications of a Multiple Critical Periods Hypothesis For Second Language Learning," in *Perspectives in Neurolinguistics and Psycholinguistics: A Series of Monographs and Treatises* 12 (1978).[4] As the

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[4]There is much evidence which shows that the age of the learner is a critical factor in one's ability to acquire a native-like pronunciation of a second language. Children are able to acquire complete control of a phonological system of another language, while post-pubic second

sociolinguistic evidence demonstrates, hardly anyone who acquires a second language as an adult ever becomes fully bilingual. Thus most of the Hispanic workers are adversely affected by the English Only policy as it forces them to speak a language with which they are not comfortable, and denies them the opportunity to speak in their primary language. Monolingual English speakers do not have to face such burdens.

D. English Only Rules Interfere With "Code-Switching"

People, especially those who acquire a second language as an adult, speak their native language "unconsciously." While they understand the "rules" which determine when and where certain types of speech are accepted, for the most part, when they are speaking to another person from their country of origin, they naturally speak in their native language. Linguistically, this is called "code-switching." Because this "code-switching" is so natural to the bilingual speaker, a work environment which requires that person to constantly think about what language he or she is speaking becomes an adverse and restrictive working environment.

Code-switching describes unconscious behavior by multilinguals who alternate between languages depending on who they speak to, the setting, and the topic of an

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language learning almost always leaves some residue of foreign accent. Herbert W. Seliger, "Implications of a Multiple Critical Periods Hypothesis in Perspectives for Second Language Learning," in *Neurolinguistics and Psycholinguistics: A Series of Monographs and Treatises* 12 (1978).

interaction. Nancy F. Conklin and Margaret A. Lourie, *A Host of Tongues: Language Communities in the United States* 161 (1983). Code-switching allows a speaker to fully communicate an idea by using the language which allows the bilingual to best or most easily convey her meaning. Even bilinguals who are fully competent in both languages code-switch. Id. at 161. Because code-switching is so natural, some speakers cannot remember the language in which they just spoke, let alone report it to an interviewer. Susan M. Ervin-Tripp, "Sociolinguistics" in 1 *Advances in the Sociology of Language* 63 (1971).

English-only rules restrict and impede this natural behavior. As one commentator has stated:

> *English only rules impose a further burden on national origin groups because employees who are not native English speakers must consciously and continuously monitor their speech.* . . . When employers deny some, but not all, the right to speak in their native language, those employees may feel isolated and inferior in the work environment. *These additional burdens illustrate an adverse impact even on those protected employees who are bilingual.*

Linda M. Mealey, *English Only Rules and Innocent Employers: Clarifying National Origin Discrimination*, 74 Minn. L. Rev. 387, 426 (1989) (emphasis added). Those who only speak English are not faced with this problem precisely because they can only speak English. Therefore, they are not required to take something which is natural (such as speaking English) and determine what other language they must use in order to communicate.

The Ninth Circuit, however, erroneously concluded that speaking one's native language to another native language speaker is a conscious choice. But as the sociolinguistic evidence demonstrates, there is no choice. Native language speakers -- no matter how fluent they are in English -- will engage in unconscious code-switching. This is not done because they are rude or inconsiderate. This is done because it is a phenomena of being a bilingual speaker. By ignoring this basic principle and by requiring native language speakers to elevate an unconscious act into a conscious one, English-only rules create a restrictive and oppressive work environment for those people for whom English is not their native language.

Because of the intimate link between language and national origin, and the difficulties in complying with English Only rules, it is clear that such rules impose practical and psychological burdens on workers for whom English is not their primary language. These rules create an atmosphere of inferiority, isolation and intimidation and are certainly within the purview of practices that Title VII was enacted to protect against.

II. ENGLISH-ONLY RULES SHOULD BE CLOSELY SCRUTINIZED BECAUSE OF THE RISK THEY ARE BASED UPON STEREOTYPICAL ASSUMPTIONS OR BIGOTED ATTITUDES.

The Ninth Circuit holding that English-only rules generally do not make out a prima facie case of national origin discrimination effectively immunizes such rules from any meaningful judicial scrutiny (except in extreme instances in which such rules are part of a pattern of racial harassment or are enforced in a draconian manner). Yet, such policies

deserve close scrutiny because they "can readily mask an intent to discriminate on the basis of national origin." Gutierrez v. Municipal Court, 838 F.2d 1031, 1040 (9th Cir. 1988), vacated as moot, 490 U.S. 1016 (1989). At the very least, there is a substantial risk that English-only only rules are based upon stereotypical assumptions.

The history for language policies restrictive of the use of native languages is relevant in this regard. While this nation's policy towards linguistic diversity has largely been one of tolerance5, restrictions on use of foreign languages have on occasion been used as a tool to repress and disenfranchise unpopular immigrants and ethnic groups.

> Increased immigration from southern and eastern Europe created a back-lash of anti-foreign sentiment. Non-English speakers, including American Indians, Japanese-

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[5] Our Founding Fathers chose not to designate an "official" language for the new nation. Heath, "English in Our Language Heritage," in *Language in the USA*, 6-19 (1981). The Continental Congress published the Articles of Confederation in English, German, and French. Perea, *Demography and Distrust: An Essay on American Languages, Cultural Pluralism, and Official English*, 77 Minn. L. Rev. 269, 285-86 (1992). During the colonial era, bilingualism in the public and private sector was common and tolerated. James Crawford, *Hold Your Tongue; Bilingualism and the Politics of "English Only"* 36 (1992). In 1780, Congress rejected John Adams' proposal to create a national language academy which was perceived as a threat to their notion of individual liberty. Perea, supra, 77 Minn L. Rev. at 297.

> Americans and Mexican Americans, increasingly found the laissez-faire attitudes of the 19th century overcome by intolerance and restrictions on the use of their languages. A program called "Americanization," designed to help immigrants learn English and to use it exclusively, soon took on xenophobic and repressive traits by requiring English proficiency for employment, voting and education. In 1906, for the first time, federal law required an alien to speak English in order to become a naturalized citizen.

Califa, *Declarating English the Official Language: Prejudice Spoken Here*, 24 Harv. Civ. Rights-Civ. Liberties L. Rev. 293, 297 (1989).

Following the Gold Rush, California enacted legislation requiring English-only education, anti-vagrancy statutes directed at Hispanics, and prohibitions against Hispanic pasttimes. Crawford, supra, at 66. In 1879, the California Constitution prohibited the publication of laws in any language other than English. Perea, *Demography and Distrust: An Essay on American Languages, Cultural Pluralism, and Official English*, 77 Minn. L. Rev. 269, 319 (1992). And in 1894, the state constitution was amended to impose an English literacy requirement for eligibility to vote. Id. at 319.

With the onset of World War I, Germans became the target of repression. Contrary to the earlier tolerance of the German language, states which had previously recognized the right of private and religious schools to teach the German language repealed those laws and made teaching in German a crime. Califa, supra, 24 Harv. Civ. Rights-Civ. Liberties L. Rev. at 298. This Court ultimately held such laws

violative of due process. Meyer v. Nebraska, 262 U.S. 390 (1923).

More recent attempts by leaders of the "English-only" movement to enshrine English as the "official" language have also been tied to immigration restrictionist agendas, directed for the most part against Hispanics. See Califa, supra, 24 Harv. Civ. Rights. - Civ. Liberties L. Rev. at 299-300, 325-329 ("Language is merely a proxy or signaling system, a convenient and more subtle way of identifying those who are unwanted").

Judicial experience teaches that laws or policies preventing the use of native languages too often constituted invidious racial or ethnic discrimination. See Yu Cong Eng v. Trinidad, 271 U.S. 500 (1926) (invalidating ordinance requiring that accounting records of businesses be kept in English, Spanish, or local dialects of the Philippines, thereby excluding the use of Chinese); Asian American Business Group v. City of Pomona, 716 F. Supp. 1328, 1332 (C.D. Cal. 1989) (ordinance restricting use of foreign languages on private business signs discriminate on the basis of national origin); Hernandez v. Erlenbusch, 368 F. Supp. 752 (D. Or. 1973) (tavern's rule against speaking of foreign languages amounted to racial discrimination against Mexican-Americans). Cf. Castro v. State of California, 2 Cal.3d 223, 230-31 (1970) (California English literacy requirement for voting motivated by fear and hatred of "illiterate and unassimilated elements of Europe" and Chinese) (citations omitted).

Hence, there is ample historical precedence for the concern that English-only rules can all too easily mask

national origin discrimination.[6] Even if well-intended, such rules are often based upon stereotyped assumptions or cater to bigoted attitudes. For instance, rules are often rationalized on the grounds that customers are indignant at hearing "foreign" languages, that speaking a foreign language in the workplace is "unprofessional", or that co-workers are uncomfortable because they assume without any basis that those speaking an incomprehensible foreign language "must be talking about me" -- rationales that amici have encountered on numerous occasions.

The risk that English-only rules may mask national origin discrimination or are based upon prejudicial stereotypes warrants the reasonable degree of scrutiny that the EEOC Guideline contemplates -- requiring the employer to justify the rule on a non-discriminatory basis. The Ninth Circuit's decision to the contrary all but removes English-only rules from scrutiny under Title VII.

CONCLUSION

WHEREFORE, amici curiae in support of petitioner pray this Honorable Court grant the petition for writ of certiorari to the United States Court of Appeals for the Ninth

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[6] The international community has long recognized the dangers of language discrimination. For instance, Article 27 of the International Covenant on Civil and Political Rights, which the United States has ratified states, "In those States in which ethnic, religious or linguistic minorities exist, persons belonging to such minorities shall not be denied the right, in community with the other members of their group, to enjoy their own culture, to profess and practice their own religion, or to use their own language." (Emphasis added.)

Circuit.

RESPECTFULLY SUBMITTED, this 28th day of February, 1994.

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